No. 20,945

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

NEIFERT-WHITE CO.,

Appellee.

On Appeal from the United States District Court for the District of Montana.

Brief of Appellee
NEIFERT-WHITE CO.

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Cases:

TEXTBOOKS

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SUMMARY OF THE ARGUMENT

It is the apellee's position that the decision of the District court should be sustained because it correctly ascertained that the facts of this case, as stated in the Complaint, do not involve a "claim against the Government". The terms of the False Claims Act are clear in that it is obvious that a necessary prerequisite for the application of the Act is that a "claim" against the Government must be involved. A "claim

within the meaning of the False Claims Act is a claim for money or property to which a right is asserted against the Government, based on the Government's own liability to the claimant. *United States v. Isidore Cohn*, 270 U.S. 339, 345-346. The Act is not limited in its application only to situations where the person guilty of the fraud personally makes the claim against the Government based on the Government's liability to such person. The Act applies where a person's fraudulent conduct causes a claim to be made against the Government, based on the Government's liability to the claimant. The claimant may be an entirely innocent party, the only requirement being that the claim contain an element of fraud. The person who is responsible for that element is liable under the Act. However, the fundamental requirement is that there must be a "claim" within the meaning of the Act.

The appellee neither made nor participated in making a claim against the Government. The proper test for discovering the presence of a "claim" is to determine whether there has been a demand for the transfer of money or property based on the Government's liability to the claimant. A "claim" or "demand" connotes the assertion of a legal right. Thus, the "claim" must be predicated on a legal obligation of the Government to the claimant. The appellee merely participated in an application for a loan. An ap-

plication for a loan is nothing more than a request to enter into a contractual agreement. There was no obligation on the part of the Government to grant the loan. Clearly, this does not meet the requirement of the Act that a "claim" be involved. The Supreme Court has admonished that since we are actually dealing with the provisions of a criminal statute, the words "claim against the Government" must be restricted not only to their literal terms, but to the evident purpose of Congress in using those terms. It is clear that the Act was not designed to reach every kind of fraud practiced on the Government but that it was to be limited to those involving "claims against the Government."

The nature and terms of the loans involved precluded the possibility that they could ever result in a claim being made against the Government. The loans were for a term of four years and carried an interest rate of 4% on the unpaid balance. The security for the loan consisted of a chattel mortgage on the fixture and, if the county committee did not feel that was sufficient, a real estate mortgage on a saleable portion of the borrower's property. The borrower was required to pay an application fee and the filing fees for all security agreements and all mortgages were equipped with acceleration clauses. It was impossible for the Government Treasury to be de-

pleted or for a claim to be made under contracts such as this.

The appellant cites numerous cases in support of its position. However, close examination of the cases reveals that they really support the appellee's position in that they demonstrate that the False Claims Act is applied only where there has been a claim against the Government, as a matter of right, based on the Government's own liability to the claimant. It is clear that the District Court properly evaluated the cases arising under this Act. The only cases disregarded by the Court below either present no precedent as to any of the issues involved here or, in one instance, recite propositions which may be relevant but which are not supported by the authorities cited by the case. This demonstrates that this appeal is based on the Government's incorrect interpretation of both the Act and the District Court's opinion. The facts in this case do not involve a "claim against the Government, as a matter of right, based on the Government's liability to the claimant" and that is a necessary prerequisite for the application of the False Claims Act.

ARGUMENT

"CHAFING AT THE UNIFORM CONSTRUCTION OF THE STATUTE, THE UNITED STATES IN EFFECT INSISTS THAT THE STATUTE IN FACT AND IN LAW APPLIES

HERE WHERE NEITHER MONEY NOR PROPERTY WAS CLAIMED FROM OR AGAINST THE UNITED STATES." *United States v. Cochran*, 235 F. 2d 131, 133 (5th Cir. 1956).

Introduction:

The only issue presented by this appeal is whether, under the facts as stated in the complaint, it can be stated that the defendant ever participated in making a false claim against the Government or was in any way responsible for inducing the Government to enter into a contract that had the result of subjecting the United States to an enforceable demand for money or property. The appellant has stated the issue in terms that are far too broad. We are not here concerned with the multiple varieties of loan programs administered by the United States Government. We are concerned only with the twelve loans that are set forth in the Complaint and which were obtained under the Farm-Storage Facility Loan Program. The appellant has attempted to portray the opinion of the court below as giving the "green light" to wholesale pilfering of the public treasury. Such portrayal is not only completely unwarranted by the opinion itself, but also has no relevance to the issue at hand. This appeal is concerned only with the Neifert-White Company and whether the loan applications for which they furnished invoices constituted

the making of "claims against the Government" which are within the purview of 31 U.S.C. § 231. It is to this issue that we direct our argument.

I

A "CLAIM" WITHIN THE MEANING OF THE FALSE CLAIMS ACT IS A CLAIM FOR MONEY OR PROPERTY TO WHICH A RIGHT IS ASSERTED AGAINST THE GOVERNMENT, BASED UPON THE GOVERNMENT'S OWN LIABILITY TO THE CLAIMANT.

It is and has been the appellee's contention that the Complaint fails to allege facts that do involve or could possibly involve a claim against the Government within the meaning of the False Claims Act. "In order to bring a case within the statute we have referred to, it is necessary to show that a claim is presented against the United States, or in rem against its property." *United States ex rel. Kessler v. Mercur Corp.*, 83 F. 2d 178, 181 (2d Cir. 1936). This Court has phrased this requirement in the following way: ". . . [T]he manner in which the fraud occurs is controlling in bringing the False Claims Act into play. To do that, there must be more than mere fraud; the fraud must be predicated on a claim." *United States v. Howell*, 318 F. 2d 162, 166 (9th Cir. 1963).

The United States Supreme Court has clearly defined what it is that constitutes a "claim" within the meaning of 31 U.S.C. § 231.

> While the word "claim" may sometimes be used in the broad juridical sense of a "demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty" (Prigg v. Pennsylvania, 16 Pet. 539, 615, 10 L.ed. 1060, 1089), it is clear, in the light of the entire context, that in the present statute, *the provision relating to the payment or approval of a "claim upon or against" the government relates solely to the payment or approval of a claim for money or property to which a a right is asserted against the government, based upon the government's own liability to the claimant. United States v. Isidore Cohn*, 270 U.S. 339, 345-346, (1926) (Emphasis supplied).

This definition of what it is that constitutes a "claim" within the meaning of the False Claims Act has met with universal acceptance. Indeed, as recently as 1963 this Court specifically adopted this definition as arig-inally given, and stated that it had not been changed or altered by *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). See, if the Court please, *United States v. Howell, supra.* As pointed out in the opinion below, the Supreme Court found this definition still relevant in *United States v. McNinch*, 365 U.S. 595 (1958) (R. 40). Although numerous other cases have relied on this definition, we deem it sufficient (as did the District Court) to point to *United States v. Tieger*, 234 F. 2d 589 (3rd Cir. 1956) as final con-

firmation of the validity and accuracy of the Cohn definition.

The Appellant has argued that *United States ex rel. Marcus v. Hess ,supra,* ". . . precluded the district court's reliance on *Cohn* as a basis for holding that, to be within the Act, a claim must be founded on a legal obligation of the Government." (Brief 10). Appellee does not take the position that the *Hess* case is incorrect, but we do take the position that the appellant has urged an interpretation of it that is unwarranted by both its language and its facts. The Government asserts that an enforceable demand for money or property, based on the Government's own liability was not involved in the *Hess* case and that, therefore, it is not necessary for a claim to be predicated on the Government's liability to the claimant. We will discuss the rather curious effect this argument has on the meaning of what it is that constitutes a "claim against the Government" at a later point. For the moment we wish to point out that there was indeed a claim involved in the *Hess* case and that the claim coincided with the definition given in *Cohn.*

As stated in appellant's brief, the *Hess* case involved several P.W.A. projects. Although the projects were sponsored by local municipalities, they were funded by the Federal Government and were under constant Federal supervision. The defendants in that

action were contractors who endeavored to insure their success, and a substantial profit margin, through the device of collusive bidding. The bidding resulted in contracts between the individual contractors and the local municipalities. There was no direct contractual relationship between the contractors and the Federal Government, but the contractors knew that the projects were largely financed by it. It is quite clear that the payments to the contractors were claims against the local municipalities for money based on the municipalities' liability to the claimants under the contracts. A demand for such payments, were it not for the fraud involved, would certainly have been enforceable. However, the False Claims Act applies only where the Federal Government has been subjected to a claim for money or property based on its own liability to the Claimant. The Federal Government was certainly under no obligation to fund the projects, nor, as we have pointed out, was it under any contractual obligation to the contractors. However, once it had agreed to fund the project and the work had begun, was it in a position to tell the local sponsors that the Federal Government had decided that it would not fund the projects, and that the local municipalities would have to finance the projects on their own? Without knowing the exact nature of the agreement between the local municipalities and the P.W.A., we

would find it difficult to believe that the Government could have withdrawn its funds and not discovered that it was subject to a claim for money based on its own liability to the claimant (which in this case would have been the local municipality). Furthermore, the amount of the claim would be determined by the bids which were submitted by the contractors. Thus, we see that although the contractors did not themselves make claims against the Government, they were responsible for the claims that were made by the local municipalities in that the latter claims consisted of sums that were fraudulently contracted for through the device of collusive bidding. Therefore, the contractors were subject to liability under the False Claims Act because they "caused to be made" false claims against the Government.

The opinion by the Court below does not say that the False Claims Act applies only where the person guilty of fraud makes a claim against the Government based on the Government's liability to him. The Act itself and the cases make it perfectly clear that it is not necessary that the person guilty of the fraud make the claim against the Government himself or that the Government's liability be to him. (Of course the Act would apply under such conditions). What is required by the Act, the cases and the opinion of the Court below, is that the guilty party cause such a

claim to be made against the Government, based on the Government's own liability, whether that liability be to the guilty party or some entirely innocent third party. Nevertheless, the Act does not apply unless there has been a claim made against the Government, based on the Government's own liability. This is why the Act is known as the False Claims Act.

An excellent example of the application of this rule can be found in *United States v. Lagerbusch*, 361 F. 2d 449 (3rd Cir. 1966), and from which the appellant takes unwarranted comfort. (Brief, 14-15). Indeed, the incorrect interpretation the appellant places on *Lagerbusch* brings into sharp focus the fundamental error upon which this appeal is based. Mr. Lagerbusch was apparently the recipient of unearned and undeserved payments as the result of false representations (of some undisclosed nature) which he made to his employer. The employer, Hercules Powder Co., was operating under a cost plus contract "under which the United States paid or reimbursed Hercules for all operating costs, including the sums fraudulently obtained from Hercules by the appellant." Here, the employee did not personally make a direct claim against the Government and the Government was under no liability to him. However, the employee's fraudulent representations caused his employer to make a claim against the Government based on the Govern-

ment's liability to the employer. The claim made by the employer contained an element of fraud (i.e. the undeserved payments caused by the employee's fraud) and that in turn caused a fraudulent claim to be made against the Government, based on the Government's own liability to the claimant (i.e. the employer). This is analogous to what happened in *Hess*. The contractors made a claim against the local municipalities which in turn made a claim on the Government for the funds it had agreed to supply. Because of the collusive bidding on the part of the contractors, the Government was required to supply a greater amount of money to the local sponsors that it should have. *Hess* was not decided on the basis of claims made by the contractors against the Government, but rather on the basis of claims against the Government which the contractors caused to be made. This is conclusively shown by the following language of the Court:

> The conclusion that the firset clause of §5438 *includes this form of "causing to be presented" a "claim upon or against the government"* is strengthened by a consideration of the other clauses of the statute. Clause 2 includes those who do the forbidden acts for the purpose of "aiding to obtain" payment of fraudulent claims; Clause 3 covers "any agreement, combination or conspiracy" to defraud the government by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." These

provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud ,without regard to whether that person had direct contractual relations with the government. (317 U.S. 537 at 544-545.) (Emphasis supplied).

It is therefore, clear why the Court in *Lagerbusch* cited *Hess* and said that there was nothing in *Cohn* that was inconsistent with their decision. The *Cohn* definition does not say that the claimant must be the person guilty of the fraud in order to bring the Act into play. Indeed, the terms of the Act itself would preclude such a holding. The fundamental requirement of *Cohn*, the Act and the cases is that a claim be made against the Government. These authorities also make it clear that no "claim" within the meaning of the Act has been made unless there has been a demand for money or property to which a right is asserted, based on the Government's own liability to the claimant. This has been the uniform interpretation given to the Act.

II.

THE APPELLEE NEITHER MADE NOR PARTICIPATED IN MAKING A CLAIM AGAINST THE GOVERNMENT. THE PROPER TEST FOR THE PRESENCE OF A "CLAIM" IS TO DETERMINE WHETHER THERE HAS BEEN A DEMAND FOR THE

TRANSFER OF MONEY OR PROPERTY BASED ON THE GOVERNMENT'S LIABILITY TO THE CLAIMANT.

If the appellee is to be held liable under the False Clams Act, it must have made a claim against the Government or aided or participated in the making of such a claim. In the interests of clarity we will first consider whether Neifert-White Co. made a claim against the Government and then we will consider whether it participated or aided in the making of such a claim. It is quite clear that the mere filing of an invoice with a governmental agency (and that is all the Complaint accuses the appellee of doing) cannot possibly be construed as making a claim against the United States.

> "An invoice", as stated by this court in Dows v. National Exch. Bank of Milwaukee, 91 U.S. 630 (23:217), "is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, or cost of the goods, or price of the things invoiced, and is as appropriate to a bailment as a sale. Hence, standing alone, it is never regarded as evidence of title." *Sturm v. Boker*, 150 U.S. 312, 328, (1893).

If an invoice does not constitute evidence of a sale, bill of sale or evidence of title, it could not possibly constitute a claim for money or property within the meaning of the False Claims Act. Therefore, the fil-

ing of the invoice, in and of itself, could not subject the defendant to liability under the statute.

This raises the second question which is whether the defendant assisted or participated in making a claim against the United States. In the Complaint, the Government alleges that it was induced to loan sums of money greater than the amount to which the borrowers were entitled because of invoices issued by the appellee. The appellee denies that the county ASC committee in any way relied upon such invoices in approving the loan applications or in executing the subsequent commitments for the loans. However, for the purposes of this motion for judgment on the pleadings, we must assume that the invoices were as integral a part of the loan applications as the Government asserts. The issue that is necessarily raised by this assumption is whether the loan applications could be considered "claims" within the meaning of the False Claims Act. What is the proper way to characterize a loan? The Court below referred to the description given at 54 C.J.S. "Loans", p. 654, (R. 41) where it is stated that:

> A loan of money has been defined as a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows * * * A loan of money is something more than the mere delivery of money by the owner to another.

> In order to constitute a loan there must be a contract whereby, in substance, one party transfers to the other a sum of money which the other agrees to repay absolutely, together with such additional sums as may be agreed on for its use.

If a loan is a contract, then an application for a loan is a request to enter into a contractual relationship. The Farm-Storage Facility Loan Program was designed to grant the growers of certain commodities the privilege of borrowing money to finance the purchase of storage facilities. ". . .[T]his privilege of contracting certainly is not a claim in normal business or legal usage and terminology." *United States v. Teiger, supra,* at 591. In footnote No. 7 of the *Tieger* opinion, the court made the following observation:

> The "claim" must be presented for "payment or approval." This describes the usual procedure in making a demand for money or property but is not an apt characterization of what is done in calling upon another to enter into a contract. *Supra,* at 591.

In the Tieger case, the complaint alleged that the defendant had made false and fraudulent representations on behalf of clients in order to secure FHA "Property Improvement Loans." It was also alleged that the loans were granted in reliance upon the credit applications filed by the defendant, and that the promissory notes, that were executed by the cli-

ents, were negotiated and assigned to the First Bancredit Corporation and that the said promissory notes were accepted by the FHA for insurance "based on a loan report submitted by the First Bancredit Corporation." The defendant moved to dismiss for failure to state a claim upon which relief could be granted under 31 USC §231. In upholding the District Court's order granting the motion to dismiss, the Court of Appeals held that the statute did not cover fraud in inducing a guarantor's promise, the performance of which was conditioned upon an event which never occurred. The court went on to explain that the alleged claim was nothing more than the privilege of a lending institution to unilaterally negotiate a contract under which it would pay a modest sum and receive in return the promise of the Government to make good any default by the borrower. In the case before us, the individual farmers were merely exercising their privilege of negotiating a loan contract with an agency of the Government.

In *United States v. Veneziale*, 268 F. 2d 504 3rd Cir. 1959) a defendant was held liable on substantially the same facts that were present in the *Tieger* case. However, there was one crucial difference between the two situations. In the *Veneziale* case, there was a default and the Government had to make good its guaranty. The court said that the defendant's wrong

was an essential factor in subjecting the Government to an enforceable demand for money. The opinion stated that it was ". . . [S]ettled that a fraudulently induced contract may create liability under the False Claims Act when that contract later results in payment thereunder by the government, whether to the wrongdoer or someone else." *Supra*, at 505.

When the above two cases are considered together the law becomes quite clear. Fraudulently inducing the Government to enter into a contract creates no liability under the False Claims Act unless that contract actually subjects the United States to an enforceable demand for money—i.e. a claim. It is the appellee's contention that the contracts to which the Government refers in the Complaint did not and could not have subjected the United States, or any agency thereof, to an enforceable demand for money. At this juncture, we wish to point out that *Tieger*, *Veneziale* and *Lagerbusch* are all from the Third Circuit. These decisions are entirely consistent and, indeed, complement one another. They demonstrate that in the Third Circuit the False Claims Act can not be applied solely on the basis of the presence of fraud. As required by *Cohn*, the fraud must result in a claim being made against the Government for money or property, and that claim must be based on the Government's liability to the claimant.

The appellant has taken issue with the lower Court's opinion that *United States v. McNinch*, 356 U.S. 595 (1958) really supports the defendant-appellee's position. Appellant argues that *McNinch* was based on the theory that a false application for credit insurance may or may not require the disbursement of federal funds and that, therefore, the proper way to determine whether the False Claims Act applies is to see whether there has been a disbursement of funds. In other words, appellant is arguing that the test for the presence of a claim is whether or not funds are disbursed and not whether a demand for money or property, based on the liability of the Government to the claimant, has been made. This is tantamount to saying that a "claim" within the meaning of the False Claims Act has been made any time the Government actually disburses money or property. We respectfully submit that such an interpretation is entirely inconsistent with the normal understanding of what it means to make a "claim". Indeed, it would effectively remove the requirement that there be a "claim" in order to apply the sanctions of the Act. "If the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent." *United States v. Howell*, *supra*, at 165. Actually, *McNinch* was decided on the obvious proposition that an application for

credit insurance may or may not result in a claim being made against the Government. In other words the decision is entirely consistent with the Third Circuit's holdings in *Tieger* and *Veneziale*. Thus, the question is whether or not a claim has been made and not whether there has been a disbursement of money. It is quite obvious that it is possible for there to be disbursements where no claims have been made, and for that simple reason, the presence of a disbursement can not possibly be an adequate test for the presence of a claim under the False Claims Act. This Court has refused to rewrite this statute to accommodate the Government in the past and we earnestly request that it refuse to do so now.

An examination of *McNinch* will show that the appellant's position is without precedent in the case law that has developed under the Act. Let us begin by considering a quotation from *McNinch* which is also set out in the appellant's brief. (Brief, 12).

> In the normal usage or understanding an application for credit insurance would hardly be thought of as a "claim against the government." As the Court of Appeals for the Third Circuit said in this same context, "*the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.*" United States v. Tieger, 234 F. 2d 589, 591. In agreeing to insure a home improvement loan the FHA disburses no funds nor

> does it otherwise suffer immediate financial detriment. It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any. *United States v. McNinch*, *supra*, at 598-599. (Emphasis supplied).

The emphasized statement above must be interpreted in the light of the general rules of grammar. The subject of the sentence is "conception", the predicate is "connotes" and the object is "demand". Thus, the sentence merely says that the conception of a claim against the Government connotes a demand. The question "demand for what?", is answered by the two prepositional phrases (i.e. "for money" and "for some transfer of public property") which modify the object of the sentence, "demand". Therefore, the *McNinch* decision follows the *Tieger* case in saying that there is no claim unless there is a demand for money or for the transfer of public property. The key word is "demand".

> *In practice, the word "demand" is defined as meaning the assertion of a legal right;* the assertion of a right to recover a sum of money a calling for a thing due or claimed to be due; *a claim;* a peremptory claim to a thing of right a request to pay; a requisition or *request to do a particular thing specified under a claim of right* on the part of the person requesting; a request addressed to a person that he will do some act which he is *legally bound* to do, after the request has been made; the right or title in virtue of which any-

> thing may be claimed, as to hold a demand against a person; also *a legal obligation;* a thing or amount claimed to be due and in a particular context the word has been construed as meaning notice requiring surrender of possession. 26A C.J.S. "Demand" p. 169. (Emphasis supplied).

Black's Law Dictionary (4th ed. 1951) gives the following definitions of "demand":

> *The assertion of a legal right;* a legal obligation asserted in the courts; a word of art of an extent greater in its significance than any other word except "claim", . . .
>
> A debt or amount due . . .
>
> *An imperative request* preferred by one person to another, *under a claim of right,* requiring the latter to do or yield something or to abstain from some act . . . (emphasis supplied).

Consequently, it is quite clear that *McNinch* and *Tieger* are quite consistent with *Cohn.* One can not be said to make a demand upon the Government unless the request which constitutes the demand is based on an obligation on the part of the Government to comply. This is necessarily so because if there were no obligation on the part of the Government, the request would be a mere naked request and could hardly be termed a demand. If the court felt that a mere naked request, not based on any obligation of the Government, was sufficient, then it is rather difficult to understand why it used the word "demand". The lan-

guage of the Act and the cases lead inevitably to but one conclusion. The False Claims Act does not apply unless there has been a claim made against the United States and such a claim is not made unless there has been a demand for money or property based on the Government's liability to the claimant.

III.

THE TERMS OF THE FALSE CLAIMS ACT MUST BE STRICTLY CONSTRUED, AND IT MUST BE APPLIED IN A MANNER THAT IS CONSISTENT WITH THE PURPOSES CONGRESS HAD IN ENACTING IT.

The United States Supreme Court has been very explicit in stating what policy is to be followed in deciding whether a claim has been made against the Government.

> We acknowledge the force of the Government's argument that literally such an application could be regarded as a claim, in the sense that the applicant asserts a right or privilege to draw upon the Government's credit. But *it must be kept in mind, as we explained in Rainwater, that in determining the meaning of the words "claim against the Government" we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous*

definitions . . . Citing United States ex rel. Marcus v. Hess, 317 U.S. 537, 542.)

The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exhorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury. *At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government.* From the language of the Act, read as a whole in the light of normal usage and the available legislative history we are led to the conclusion that an application for credit insurance does not fairly come within the scope that Congress intended the Act to have. *United States v. McNinch, supra*, 356 U.S. 595 at 598-599. (Emphasis supplied).

It is the appellee's position that filing an application for a loan does not come within the intent of the Act either, particularly under the circumstances in which these loan applications were filed. The Supreme Court has emphasized that the terms of the Act, and especially the words "claim against the Government" are to be strictly limited to the evident purpose of Congress in using those terms. This is a particularly relevant admonishment here, as the potential penalty

is very great when compared to the magnitude of the alleged wrong of the defendant-appellee. This also seems to be an opportune time to point out that the first portion of the above quotation from *McNinch* utterly refutes the argument of the appellant that, ". . . with few (if any) exceptions no individual has any more of an enforceable right to a grant-in-aid from the Federal Government than he does to a loan of public monies." (Brief, 6). On the preceeding page (Brief, 5) the appellant admitted that there was no legal obligation on the part of the United States to approve the grain grower's applications for loans.

Footnote No. 9 of the *McNinch* decision contains the following background on the False Claims Act and provides valuable insight into the type of situation Congress was trying to remedy.

> The manager of the bill in the Senate stated as follows:
>
> "I will simply say to the Senate that this bill has been prepared at the urgent solicitation of the officers who are connected with the administration of the War Department and Treasury Department. The country, as we know, has been full of complaints respecting the *frauds and corruptions practiced in obtaining pay from the Government* during the present war; and it is said, and earnestly urged upon our attention, that further *legislation is pressingly necessary to prevent this great evil;* and I suppose there can be

no doubt that these complaints are, in the main, well founded. From the attention I have been able to give the subject, I am satisfied that more stringent provisions are required for the purpose of punishing and preventing these frauds; and with a view to apply a more speedy and vigorous remedy in cases of this kind the present bill has been prepared." Cong. Globe, 37th Cong., 3rd Sess. 952.

Apparently there were no committee reports nor any record of the proceedings in the House. —This footnote appears at 356 U.S. 595, 599. (Emphasis supplied).

IV.

THE VERY NATURE OF THE LOANS INVOLVED PRECLUDED THE POSSIBILITY OF THEIR PROVIDING A BASIS FOR A CLAIM AGAINST THE GOVERNMENT.

Let us now examine the loan applications and contracts that are involved in this case. The terms of these contracts are clearly set forth in the Farm-Storage Facility Loan Program Regulations which can be found at 23 Federal Register 5029 (July 2, 1958). The loans were made for a term of four years. The interest rate on the loans was 4% per annum on the unpaid balance.

> *Loans will be secured (1) by chattel mortgage on the storage facility,* which shall constitute the sole lien on such facility, *or (2) by a first lien in the form of a real estate mortgage,* deed or trust,

or other security instrument, approved by CCC, on the borrower's farm or other property on which the facility is to be located, or on such acreage of the farm as will, in the judgment of the county committee, (i) make the site easily accessible for use of other farmers in the area, and (ii) constitute a saleable unit. *A first lien on real estate will be required in connection with all loans relating to immovable facilities, and may be required in connection with any other loan at the discretion of the person authorized by CCC to approve the loan,* . . . In case of chattel mortgage loans, a severance agreement must be executed and acknowledged by all persons having an interest in the land on which the structure will be placed, . . . The cost of recording or filing all documents required in connection with the loan shall be paid by the borrower . . . Every application for a farm storage facility loan secured by a chattel mortgage shall be accompanied by an instrument, duly acknowledged for recording purposes, under which the owner of the premises on which the facility is to be located consents that if the farm storage facility is acquired by CCC through foreclosure or other means, *such facility may, at the option of CCC, remain on the property for a period not to exceed six months at no expense to CCC* . . .

Each installment must be paid out of price support proceeds, in cash, or otherwise not later than the end of the applicable twelve months pay period, and *upon failure to pay any installment* by the thirtieth day after the end of such period *the*

> *loan may be declared delinquent* and at the option of the county committee upon authorization of the State Committee *the loan may be called and the entire unpaid amount of the loan shall become immediately due and payable.* FARM-STORAGE FACILITY LOAN PROGRAM REGULATIONS, §474.725. (Emphasis supplied).

It is very apparent that the Government has provided very well for its own interests. One very significant point is that the Government is not limited to the facility itself for security for its loan. Indeed, if the county committee feels that the storage facility is not of sufficient value to cover the amount of the loan, it can require additional security in the form of a real estate mortgage on a plot of real estate of sufficient value to make up whatever deficit the committee deems necessary. Obviously, the committee is thus required to make some estimate of the value of the facility in order to determine whether or not a real estate mortgage will be required in addition to the chattel mortgage on the facility. It is also significant that §474.727 of the Regulations requires that the constructed facility be inspected by a designated employee of the county committee or the committee itself before actual disbursement of the loan takes place.

It is the appellee's contention that under this type of contract the Government could never be subjected to an enforceable claim for money based on its own liability, even if the loans had been defaulted (which is not the case here). On the contrary, when the Government finally made disbursements for the loans involved here it received in return chattle and/or real estate mortgages which it had determined to be of sufficient value to prevent any loss in case the repayments were defaulted. Thus, under the transactions here involved, it was virtually impossible for the United States Treasury to be depleted, because, when it disbursed the loan it received security in the form of mortgages which it had determined to be of equal value to the disbursement. It is to be noted that the Complaint contains no allegation that any of the loans were ever defaulted. The reason they contain no such allegation is because none of the loans were defaulted. It is incredible that the Government can seriously contend that it was in any way financially disadvantaged by the application for, or the awarding of, these loans, particularly where every one was paid in full, complete with interest. As far as the terms of the loans being superior to those obtainable from commercial sources, we can only say that we would be interested in knowing what safety devices commercial lending institutions use that the Government did not provide for in these cases. It is true

that the 4% interest charged by the Government is somewhat less than the commercial rates, but this does not mean that the Government was disadvantaged thereby. Indeed, it could not be said that the Government was disadvantaged in any sense unless it could be said that had they not loaned the money to the borrowers at 4% they could have loaned it elsewhere at a higher rate. Since the Government has not, to our knowledge, begun to compete in the commercial banking buiness, we doubt that it could or would have loaned its money elsewhere at higher interest rates. This interest differential could thus be deemed a subsidy only in the broadest possible sense of the word. Surely it is much less a subsidy than farm price-support payments as it involves no out-of-pocket expenditure by the Government.

V.

THE REMAINDER OF THE CASES CITED BY THE APPELLANT DO NOT CONFLICT WITH THE OPINION OF THE DISTRICT COURT BELOW, BUT RATHER, ARE IN HARMONY WITH IT.

There remain several cases cited in the appellant's brief that we have not yet discussed. We will begin with *United States v. Alperstein*, 183 F. Supp. 548 (S.D. Fla. 1960), affirmed, 291 F. 2d 455 (5th Cir. 1961). The appellant states at page 15 of its

brief that, "While *a veteran does not have a legally enforceable right* to treatment for a non-service connected disability in a VA institution, he *may* be given such treatment on a space-available basis if he is financially unable to pay the necessary expenses of hospital care." (Emphasis supplied). We find this statement impossible to reconcile with the following statement found at page 550 of the *Alperstein* case:

> *The statute is mandatory in terms, leaving no discretion to the Administrator of Veterans Affairs or to his designates or subordinates as to the admission or rejection of applicants.* It establishes a simple standard of eligibility and evidence of qualification, which, when met, automatically precludes the Veterans Administration from refusing to provide the applicant with hospitalization. *When the applicant proves that he is an otherwise eligible veteran, and when he states that he is unable to defray the cost of hospitalization, the Veterans Administration has no choice other than to admit him and to treat him.* United States v. Petrik, D.C. Kan., 154 F. Supp. 598. (Emphasis supplied).

It is thus apparent that the *Alperstein Court* was definitely of the opinion that Mr. Alperstein had a legally enforceable right to be admitted to the VA hospital. Actually, the only real question in *Alperstein* was whether the claim for hospital care constituted a claim for "money or property" within the meaning of the Act. In holding that such a claim was within the Act

the Court said that a claim for services depletes the treasury in the same manner as would a claim for money or property. For our purposes, the crucial point is that the *Alperstein* case does not stand for the proposition that there can be a "claim" against the Government where there is not an enforceable claim for money or property based on the Government's liability to the claimant. In short, the "claim" in *Alperstein* meets all the requirements of the *Cohn* definition.

Appellant also cites *Smith v. United States*, 287 F. 2d 299 (5th Cir. 1961), as a holding directly contrary to the ruling below in this case. Mr. Smith was the Executive Director of the Beaumont Housing Authority (BHA). BHA was the lessee of a housing project owned by the Federal Government.

> Under the lease BHA agreed to pay as rental the amount by which operating revenues exceeded approved expenses for the preceeding quarter. Under other provisions the Government agreed to advance funds to cover operating deficits. Quarterly reports had to be filed by the lessee reflecting the amount due to, or due by, the Government depending on whether operations reflected a surplus or a deficit for that quarter. *Supra*, at 300.

Because of Mr. Smith's fraudulent conduct, the operating costs exceeded the income on the quarterly re-

port, and the resulting deficit required the Government to advance funds under the contract with BHA. Clearly, there was no Governmental liability to Mr. Smith. However, there was contractual liability between the Government and BHA. The Court said:

> So far what we have said may have given the impression that the false claims were the signing, delivering and cashing of the checks. This is not the case. That discussion was to demonstrate the permissible basis for the Court's conclusion that the underlying transactions were a fraud. The false claims arose because Smith, as Executive Director, knowing the true facts to be otherwise signed the quarterly reports which included these disbursements as allowable expenses. No Federal money as such was paid to or received by Smith, Celestine or the "double timing" employee. The Federal Treasury suffered because BHA, having made the disbursements, got them back from the Federal Government either as an outright payment, or as a deduction of like amount what otherwise would have been remitted by BHA as rental. *Supra*, 303-304.

Thus, Mr. Smith's fraud did result in a claim being made against the Government for money based on the Government's liability under its contract with the claimant (BHA). The above quote indicates that the Court was of the opinion that Mr. Smith would have been subject to the Act even if a deficit had not resulted and the only effect of his fraud would have

been to reduce the amount of rent paid to the Government. Clearly, the Court could not embrace such an opinion if it thought that the proper test for the application of the False Claims Act was whether or not funds had been disbursed.

Of *Sell v. United States*, 336 F. 2d 467 (10th Cir. 1964) the appellant says, "This holding, too, would not have been possible had the Act been read as requiring that the claim 'be founded as of right upon the Government's own liability to the claimant.'" (Brief, 17). On page 474 of the opinion, the Court says otherwise.

> In the instant case, unlike the Borth case, the purpose of the claim was to obtain property. The purchase Orders received by Sell as the result of his application were *fully negotiable* through any authorized feed dealer and were valuable items of property which, upon issuance, caused the Commodity Credit Corporation to "suffer immediate financial detriment," in that *it became liable to redeem such Purchase Orders* for Dealer Certificates, which, in turn, were redeemable for grain owned by Commodity Credit Corporation. (Emphasis supplied).

Sell's fraudulent representations caused the CCC to issue Negotiable Purchase Orders to him. Since these purchase orders were fully negotiable, the Government became liable to whomever presented them for Government owned grain. Had it not been for the fraud

of Sell, the Government would not have been liable for the Purchase Orders he caused them to issue. Clearly, this case involved a claim against the Government based on its liability to the claimant (i.e. the holder of the Purchase Orders).

Also cited by appellant is *United States v. DeWitt*, 265 F. 2d 393, (5th Cir. 1959). The defendant was a real estate dealer who was found subject to the penalties provided in the False Claims Act. Here some 29 veterans had applied for home loans through the Veterans Administration. One of the conditions for the disbursement of the loans was that the veteran intended to occupy the home as his residence. In each of the 29 cases the veteran decided not to occupy the home at some time after the loan commitment had been issued and before the final sale and disbursement of the loan. The defendant, who was the dealer in each case, agreed to repurchase the home from the veteran as soon as the transaction was complete. In other words, the veteran bought and sold the home in a few minutes time. In the meantime, the dealer represented to the lending institution that all was in order and that the loan should be disbursed. It was apparently established that at the time this representation was made to the lending institution the defendant knew that the veteran did not intend to occupy the home. Under the legislation existing at that time,

a gratuity of about $160 was paid by the Government to the lending institution to be credited to the veterans account, at the time the loan was disbursed. Since the loan commitment had already been issued and the veteran's eligibility determined, the Government was obligated to pay the $160 gratuity when the dealer represented to the lending institution that the transaction had been completed, that it met all the requiremens, and that the loan should be disbursed. The fraud lay in the fact that the dealer knew that the veteran did not intend to occupy the house and that the veteran was, therefore, not entitled to the loan or to the gratuity. Clearly, the dealer had caused a claim to be made against the Government that was within the meaning of the term "claim" as defined by *Cohn*. Once the veteran's eligibility had been determined, he had an enforceable right to the Government's guaranty and to the payment of the gratuity, provided he intended to occupy the home. Therefore, the dealer's representation to the lender that the veteran intended to occupy the home constituted a false claim, because, had it been true, the Government was bound by legislation to pay the gratuity.

The appellant urges that the District Court improperly dismissed *United States v. Rainwater*, 244 F. 2d 27 (8th Cir. 1957), affirmed 356 U.S. 590. The appellant concedes that the only question decided by

the Supreme Court was whether a claim against the Commodity Credit Corporation was a claim against the Government, but urged that the Circuit Court decided something more, i.e. that the loans on cotton were false claims within the meaning of the False Claims Act. We do not agree that the Circuit Court decided that second question.

> The briefs and arguments of counsel are confined to two propositions: *One*, do false claims submitted to wholly owned government corporations, such as Commodity Credit Corporation, come within the purview of the False Claims Act as claims "against the Government of the United States, or any department or officer thereof"? *Two*, do the complaints state facts upon which relief may be granted where there has been no specific allegation of damage? *Supra*, at 28. (Emphasis supplied).

All the second issue was concerned with was whether it was necessary for the complaint to set forth specific allegations of damages which were allegedly caused by the misconduct of the defendant. Clearly, the court could (and did) confront both of the above propositions without ever considering whether or not an application for a cotton producers' loan constituted the making of a claim against the Government.

The appellant may argue that since the case did involve loans on cotton, a loan application must con-

stitute a claim against the Government within the meaning of the Act, since the defendants were indeed found liable. A similar argument could be made on the basis of *Toepleman v. United States*, 263 F. 2d 697 (4th Cir. 1959), and the answer we give to *Toepleman* applies with equal force to *Rainwater*. The decisions that were written with regard to *Toepleman* do not give a very clear picture of exactly what the facts of the case were. Apparently, the action was based on 82 fraudulent promissory notes that accompanied an application for a cotton producer's loan from the CCC. The fraud was in representing that the cotton had been produced by the makers of the notes when, in fact, it had not been. Forty-three of the notes were defaulted and the cotton which was to secure the loan was not of sufficient value to cover the amount of the defaulted notes. In short, the Government's loan was secured by non-existent property. In searching the opinions handed down on this case we do not find any discussion of the question as to whether or not a "claim against the Government" was involved. Indeed, all of the decisions are concerned solely with the question as to whether a claim against the CCC is tantamount to making a claim against the United States. The final decision was that it was, and in this we willingly concur. However, we do not agree that this case (or *Rainwater*) presents any precedent for arguing what it is that constitutes a claim against the

Government. It is possible that the issue involving the presence of a "claim" was not even raised, let alone decided. Even if it was decided, the opinions (in both *Toepleman* and *Rainwater*) give no clue as to the reasons for such decision, or the meaning that was attached to the words "claim against the Government" by the court in making that decision. Indeed, if the defendants' counsel had raised the question of the presence of a "claim", it would seem that some mention of it would have appeared in at least one of the opinions. In short, these cases are the weakest possible precedent for the proposition that a claim was involved here, and in order to follow it, this court would have to ignore the vast majority of cases that have given meaning and content to the phrase "claim against the Government" in favor of an unknown and undefined position that has no basis in legal or commercial usage and understanding. Therefore, the appellee respectfully submits that neither of these cases (*Toepleman* or *Rainwater*) is in point.

We come now to *United States v. Cherokee Implement Company*, 216 F. Supp. 374 (DC Iowa, 1963). We agree that the factual situations in this case and *Cherokee* are analogous, but we urge the Court to examine the case very closely before deciding on its worth as a precedent for the action involved here. On pages 25 and 26 of the appellant's brief there appears

a statement as to what the *Cherokee* case considers to be the proper test as to whether a claim has been made against the Government. The Court starts out by giving an accurate statement of the definition of a test for th epresence of a "claim againest the Government" as found in *McNinch*, but then goes on to say that "Where the United States actually makes a loan by reason of a false application, there *may be* a claim under the false claims statute." (emphasis supplied). For this proposition, the court cites *United States v. Rainwater, supra.* As we have pointed out, we fail to find any support for this proposition in *Rainwater* and it would seem sufficient to say that if the case does contain any comment or innuendo to this effect it its purely dicta because neither the Circuit Court nor the Supreme Court based their decisions on this issue.

The *Cherokee* Court's obvious confusion as to what was involved in the issue before it is demonstrated in the following statement made at page 375 of the opinion:

> In United States v. Veneziale, 268 F. 2d 504 (3rd Cir. 1959), it was considered a false claim when the Government had to pay on a loan guaranteed. In all these cases where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. §231, Smith v. United States, 287 F. 2d 299 (5th Cir. 1961); United States v. Brown, 274 F. 2d 107

(4th Cir. 1960); United States v. Globe Remodeling Co., Inc., D.C. 196 F. Supp. 652.

The appellant asserts that the Court below brushed this case aside because none of the cases cited involved loan applications. We wish to assert that the reason the Court below brushed this case aside is that the cases which it cites do not support the propositions for which they are cited. We have already pointed out that the *Smith* case did not involve a loan and that the case did involve a claim based on the Government's liability to the claimant. Furthermore, the *Smith* case indicated that Mr .Smith would have been liable even if his fraud had not caused a disbursement of money but would have reduced the amount of rent payable to the Government. The *Brown* case involved a defedant who had planted more tobacco than his acreage allotment allowed. Excess crops were ordinarily marketed at a penalty and were not eligible for price supports. The CCC had authorized a local cooperative to pay prices up to the support level for crops that were harvested within the allotment. The defendant marketed his excess crop in conjunction with a neighbor who had not harvested an amount equal to his quota under the neighbor's "Within Quota" card. They were paid support prices for the excess by the cooperative, which in turn was subsidized by the CCC. The cooperative could not have refused to pay support prices on any crop that was within the grower's acreage al-

lotment, just as the CCC could not have refused to reimburse the cooperative for the support prices it paid. The farmers did not make a claim directly against the Government. However, because of the false representation they did make, the cooperative innocently mad a claim against the Government for a larger subsidy than the Government should have been required to pay. The "claim" was based on the Government's liability to the cooperative.

How *Brown* could possibly be cited as authority for the proposition that "where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. §231" is beyond comprehension. The difference between a price support payment and a loan is such that it would seem to be impossible to confuse them. The *Globe Remodeling* case is similar to the *Veneziale* case and is *not* authority for the proposition for which it is cited for the very obvious reason that it involved Governmental liability on an insured loan. The *Cherokee* case involved a loan to cover the purchase price of mobile drying equipment, while *Veneziale* involved a guarantor's payment by the Government on a defaulted FHA insured loan. The *Brown* case involved the fraudulent collection of crop price supports by a farmer not entitled to receive them. How a court could equate these situations is difficult to understand. It would seem that the only common element was that in *Veneziale*,

Smith, *Globe Remodeling* and *Brown* the Government suffered financial detriment as the result of claims that had been made against it as matters of right. There was no hope or expectation of repayment. Indeed, there was no obligation to repay; the Government had been separated from its money and had received nothing in return. But in *Cherokee* the Government had merely loaned some money. In other words, it had disbursed a sum of money with the hope, expectation and contract right of having it returned. The loan was also probably secured by a chattel mortgage on the drying equipment. In this situation, when the Government parted with its money it received something of equal value in return.

In addition, it should be pointed out that the *Cherokee* case did not say that a claim *was* involved, it merely said that a claim *may* be involved. The written opinion did not decide the issue. Instead, the court proceeded with the trial and heard evidence on the matter. Since the case was never appealed, the outcome remains unknown. Therefore, in addition to being poorly reasoned and making fundamental errors in the law, the case presents very weak authority for the appellant's point of view because it did not really resolve the question as to whether or not a claim was involved. Thus, it is not surprising that the court below dismissed Cherokee as not convincing. We are surprised that the Government is convinced by it.

CONCLUSION

We respectfully redirect the Court's attention to the definition of "claim against the Government" as given in the *Cohn* case. *Cohn* correctly stated the proper test for the application of the False Claims Act when it was written and this test continues to be entirely valid today. By bringing this action and this appeal the Government has tried to expand the terms of the Act far beyond the original scope of Congressional intent. The False Claims Act applies only where a "claim" has been made against the Government. As we have pointed out above, no such "claim" has been made here. The defendant has been forced to bear the burden of defending these actions because of the Government's reckless disregard for the clear meaning of the Act and the pronouncements of the cases that have construed it. For these and all of the above reasons, the defendant-appellee respectfully requests the Court to sustain the decision of the District Court.

Respectfully submitted,

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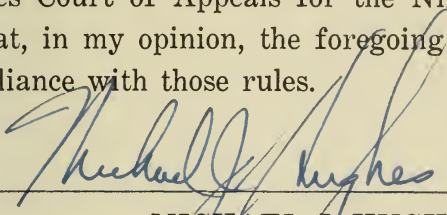
CERTIFICATE OF COMPLIANCE

I certify that, in connection with the praparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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